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IN THE

Supreme Court of the United States

October Term, 1967
No. 941

FRANK ANTHONY CARCERANO,

Petitioner,

vs.

CLARENCE T. GLADDEN, Warden of the Oregon State Penitentiary, or JOHN DOE, Acting Warden,

Respondent.

PETITION FOR A WRIT OF CERTIORARI.

After Order Denying Habeas Corpus by Supreme Court of the State of Oregon.

FRANK ANTHONY CARCERANO,
Box 28711,
2605 State Street,
Salem, Oregon 97310,
Attorney in Propria Persona.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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vs.

CLARENCE T. GLADDEN, Warden of the Oregon State Penitentiary, or JOHN DOE, Acting Warden,

Respondent.

PETITION FOR A WRIT OF CERTIORARI.

To the Honorable Earl Warren, Chief Justice of the Supreme Court and to the Associate Justices; Greetings:

I.

The Petitioner respectfully requests Certiorari after having had his Petition for a Writ of Habeas Corpus denied by the Supreme Court of the State of Oregon.

II.

The denial was on 25 July 1967, and the letter notifying Petitioner is attached hereto and incorporated herein as Appendix A. The denial came without a hearing or an opinion.

III.

The Respondent, represented by the Attorney General of Oregon, filed a Memorandum in Opposition to Peti-

tion for Habeas Corpus which is attached hereto and incorporated herein as Appendix B.

IV.

Rule 19., 1.(a), 28 U.S.C.A. is cited by Petitioner as the basis for the review of the order denying the Great Writ; Rule 22., 1.; 28 U.S.C.A. indicates that this petition has been filed in the time allowed; and Rule 33., 3 (c)., 28 U.S.C.A. has been complied with by serving this petition upon the real parties in interest.

V.

Nine copies of the Petition for Habeas Corpus will be filed concurrently with this petition and are hereby incorporated as Appendix C. Thus, Appendix A., B. and C. now constitute the entire record of the proceedings in Habeas sought to be reviewed and Petitioner hereby so certifies.

VI.

Appendix C. is filed not in contravention of Rule 23., 3., 28 U.S.C.A., but hopefully in the spirit of Rule 21., 4., 28 U.S.C.A.

VII.

The question presented for review is whether the provision of the Oregon Constitution in Article I, Section II, providing for less than a unanimous jury verdict in a non-capital felony case is unconstitutional.

VIII.

The *Oregon Constitution,* Article I, Section 11 provides as follows:

"RIGHTS OF ACCUSED IN CRIMINAL PROSECUTION. In all criminal prosecutions, the accused shall have the right to public trial

by an impartial jury in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor; provided, however, that any accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and consent to be tried by the judge of the court alone, such election to be in writing; provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise; provided further, that the existing laws and constitutional provisions relative to criminal prosecutions shall be continued and remain in effect as to all prosecutions for crimes committed before the taking effect of this amendment."

(Capital punishment was repealed, effective 30 November 1964, *Oregon Constitution* Article I, Sections 37 and 38.)

IX.

The facts alleged by Petitioner to the Supreme Court of Oregon are reiterated here verbatim (except the numbering and the lettering), because they indicate why it is imperative that certiorari be granted. The facts (again, exactly as alleged in Oregon):

"Comes now the petitioner, Frank Anthony Carcerano, and by this verified petition asks this court for a writ of habeas corpus pursuant to the Oregon Con-

stitution, Article I, §33[1] and Article VII (Amended) §2[2], and alleges:

A.

That Frank Anthony Carcerano is imprisoned, detained, confined and restrained of his liberty by Clarence T. Gladden, Warden of the Oregon State Penitentiary, and is presently serving a sentence of life imprisonment for armed robbery (ORS 163.280)[3] imposed by the Circuit Court for the County of Lane at Eugene, Oregon, on 11 May 1962 by the Honorable E. H. Howell, Judge *Pro Tempore*.

B.

That a copy of the Judgment of that court is attached to this Petition as Exhibit 'A'.

C.

That a copy of the Indictment is attached to this Petition as Exhibit 'B'.

D.

That your petitioner was tried and convicted by a jury of this offense on 11 May 1962 after four consecutive days of trial.

E.

That said imprisonment, detention, confinement and restraint are illegal; and petitioner is informed and

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[1]Oregon Constitution, Art. I, §33. 'HABEAS CORPUS. The Privilege of the writ of habeas corpus shall not be suspended * * *'

[2]Article VII (Amended), §2. '* * * the supreme court may, in its own discretion, take original jurisdiction in * * * habeas corpus proceedings.'

[3]ORS 163.280 '* * * and robbery while armed with a dangerous weapon * * * shall be punished upon conviction by imprisonment for life * * *.'

believes and therefore alleges that the illegality thereof consists in this, to wit:

(1) That the verdict rendered, received and entered by the court on 11 May 1962 (and the ensuing judgment) was illegal, void and without force or effect, because it was rendered pursuant to the Oregon Constitution, Article I, §11[4] which provided that in a felony case, a decision of ten of the twelve jurors will suffice for conviction in derogation of petitioner's rights under the Federal Constitution, Amendments V, VI and XIV, and the applicable counterparts of the Oregon Constitution.

(2) That the petitioner is informed and believes and therefore alleges that the said verdict rendered, received and entered by the circuit court was less than the unanimous verdict of the jury; but void in any event because it was received under the Oregon Constitution, Article I, §11, and the instruction of the court to the jury appearing at page 393, lines 3 to 5, of the Transcript of Proceedings of the trial, which reads as follows:

> 'Now, this is a criminal case as distinguished from a civil case, and in this case it takes ten or more of your number to agree upon either one of these two verdicts * * *.'

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[4]Oregon Constitution, Art I, §11. 'Rights of Accused in Criminal Prosecution. In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury * * * provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise * * *.' (Adopted 18 May 1934) (Capital Punishment [Const. Art. 1, Sec. 37 and 38] Repealed-Effective 30 November 1964).

F.

That the petition is informed and believes, and on that ground alleges, that it does not appear in either the official records of the circuit court or in the Transcript of Proceedings of the "Full, true, accurate and complete record of the oral proceedings had in said cause"[5] whether or not the verdict was unanimous or whether the jury was polled on the guilty verdict entered.

G.

That the petitioner appealed—with counsel—from the judgment of conviction to this honorable court in *State v. Carcerano* (1964), 78 Ad. Or. Rep. 611* (390 P. 2d 923), certiorari denied (1964), 379 U.S. 891 (85 S. Ct. 165), and 380 U.S. 923 (85 S. Ct. 921), where his conviction was affirmed.

H.

That your petitioner did not raise the point here involved (namely, that the judgment is void because a verdict of less than a unanimous vote of the jury is allowed) in either court; and thus, is disabled from seeking relief under the Oregon Post-Conviction Hearing Act (ORS 138.510 to 138.680) because such ground could reasonably have been asserted in the direct appellate review proceeding(s),[6] (ORS 138.550 [2][6];

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[5]Transcript of Proceedings, page 418, lines 6 and 7.

*238 Or. 208.

[6]ORS 138.500 (2). 'When the petitioner sought and obtained direct appellate review of his conviction and sentence, no ground for relief may be asserted by petitioner in a petition for relief * * * unless such ground was not asserted and could not reasonably have been asserted in the direct appellate review proceeding * * *'.

and, therefore, petitioner seeks habeas corpus. (ORS 138.540).[1]

I.

That your petitioner is asking and praying that this honorable court exercise its power of original jurisdiction in this case because your petitioner is asking this court to reconsider and overrule this court's decision in *State v. Osbourne* (1936), 154 Or. 484 (57 P. 2d 1083), (holding the Oregon Constitution, Article I §11 constitutional), which a lower court, obviously, cannot do.

J.

That *Osbourne* relied solely upon the ***obiter dictum*** in *Maxwell v. Dow* (1900), 176 U.S. 582, 20 S. Ct. 448, 44 L. Ed. 597, which (as will be seen) has, almost certainly, been overruled in recent years by the United States Supreme Court . . . the reasoning, the interpretation, and the law.

K.

That Points and Authorities are attached hereto and incorporated herein be reference as Exhibit 'C'.

L.

That your petitioner, Frank Anthony Cacerano, Oregon State Penitentiary Number 28711, was committed to the custody of the said Clarence T. Gladden, Warden of the Oregon State Penitentiary, on 12 May 1962, and has been in custody continuously since said time and has not been taken before any court or magistrate.

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[1]ORS 138.540. '* * * With the exception of habeas corpus, all criminal law post-conviction remedies * * * are abolished in criminal cases.'

M.

That you petitioner is informed and believes, and on that ground alleges, that is not imprisoned, or restrained by virtue of any order, judgment, decree or process specified in ORS 34.330, except as specifically stated herein.

N.

That on or about 10 December 1963, while his appeal was pending in this court, the petitioner signed and then filed a petition for a writ of habeas corpus in the United States District Court for the District of Oregon; this petition was denied on or about 24 December 1963 by the Honorable Gus J. Solomon, United States District Judge; and on or about 10 January 1964 the same judge denied a certificate of probable cause, although allowing the notice of appeal from the denial of the petition for a writ of habeas corpus to be filed on or about 11 February 1964; but, the matter terminated on or about 11 February 1964 in an order signed by the Honorable Richard H. Chambers, Judge of the United States Court of Appeals for the Ninth Circuit, indicating that the appeal was frivolous and not taken in good faith, where the denial of habeas corpus was predicated upon the fact that the petitioner's appeal was still pending in this court.

O.

That indeed, the petitioner who was not represented by counsel in the proceedings above mentioned, now acknowledges that the petition was premature and was not meritorious because it alleged only that the state court system in Oregon held him illegally in involuntary servitude.

P.

That no other petition for a writ of habeas corpus has been made by or on behalf of said petitioner in regard to this imprisonment and restraint, in any court.

Q.

That the petitioner is a citizen of the United States of America.

R.

That the petitioner is suffering irrevocable injury in being held, detained and imprisoned.

S.

That the attorneys for the People of the State of Oregon, the District Attorney of Lane County, Eugene, Oregon, and the Attorney General of Oregon, were each served with a copy of this Petition at or before the time it was filed in this court.

T.

That the respondent, Clarence T. Gladden, Warden of the Oregon State Penitentiary, was served with a copy of this Petition at or before the time it was filed in this court.

U.

That the granting of a writ of habeas corpus is petitioner's only, plain, speedy and adequate remedy under the law.

Wherefore, your petitioner prays that a writ of habeas corpus may be granted,[8] directed to the said Warden of the Oregon State Penitentiary, Clarence T. Gladden,

[8]or in the alternative, that this Petition be deemed an application for relief pursuant to the Oregon Post-Conviction Hearing Act, if such be thought to be the correct remedy.

commanding him to have the body of Frank Anthony Carcerano, by whatsoever name he may be called or charged, before this court at a time and place therein to be specified, to do and receive what shall then and there be considered by this court concerning said prisoner and certify and return therewith the time and place and cause of said imprisonment or restraint before the court or judge hearing the writ; that the said petitioner may be restored to his liberty; and that the petitioner be granted such other and further relief as may be just and appropriate.

Respectfully submitted,

JOHN PATRICK COONEY, ESQ.,
of the Oregon State Bar, Associating,

WALTER L. KRONEBERGER, JR., ESQ.,
of the California State Bar,[9]

Dated: June 15, 1967.

WALTER L. KRONEBERGER, JR.,[10]
Attorneys for Petitioner.

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[9]ORS 9.240. 'Appearance of Attorneys Licensed in other Jurisdictions. An attorney of the highest court of record in any other state * * * may appear, if associated with an active member of the Oregon State Bar, as counsel for a party in a particular action, suit or proceeding in court, or before a judicial officer of this state.'

[10]The certificate of the Clerk of the Supreme Court of California concerning the eligibility of Walter L. Kroneberger, Jr., to practice law is attached hereto and incorporated herein by reference as Exhibit 'D'.

X.

The arguments advanced by petitioner to the Supreme Court of Oregon are reiterated here verbatim* —may it please the court:

ARGUMENT.

The Provision of the Oregon Constitution in Article I, Section 11, Providing for Less Than a Unanimous Jury Verdict Is Unconstitutional.

> "The basic elements of English common-law jury trial thus guaranteed are: (1) that the jury should consist of twelve persons; (2) that the trial should be supervised by a judge with power to instruct as to the law and to comment on the evidence; and (3) that the verdict be unanimous."
>
> *13 Encyclopaedia Britannica,* Jury, p. 160.

Thompson v. Utah (1898), 170 U.S. 343 (18 S. Ct. 620) tells us that the "jury" defined under the Sixth Amendment for the Federal Government is the common law jury defined in the encyclopaedia . . . twelve men, no more, no less, arriving at a unanimous verdict.

Maxwell v. Dow (1900), 176 U.S. 582 (20 S. Ct. 448), the keystone of *Osbourne,* used *Hurtado v. California* (1884), 110 U.S. 516 (4 S. Ct. 111) to show that if a state wasn't bound by the edict of the Fifth Amendment to procure an indictment as is required of our nation, then a state is not bound to give a criminal defendant a common law jury.

This concept is not inaccurate history; it is unfortunate and spurious logic because in *Hurtado* the defendant received *more* protection from the California

*Except the numbering of footnotes.

scheme of a preliminary hearing,[11] than from a grand jury indictment. In *Dow* the defendant got *less*: eight instead of twelve jurrors.

Harlan, *J.*, dissenting in *Dow* said this:

> "If it be said that there need be no apprehension that any State will strike down the guarantees of life and liberty, which are found in the National Bill of Rights, the answer is that the plaintiff in error is now in the penitentiary of Utah as the result of a mode of trial that would not have been tolerated in England at the time American independence was achieved * * *"

Mr. Justice Harlan then must have forgotten *Barron v. Baltimore* (1883), 7 Pet. 243 (32 U.S. 242), where Mr. Chief Justice John Marshall held for the majority,

> "These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them. * * * This court, therefore, has no jurisdiction of the cause, and it is dismissed."

Even after the Fourteenth Amendment was ratified on 28 July, 1869, it was said that

> "due process of law does not, in and of itself, require a jury trial in a criminal case * * *
>
> *16 A.C.J.S. Constitutional Law,* Sec. 590, p. 655.
>
> *Hughes v. Heinze* (1959), 9 Cir., 258 F.2d 864.

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[11]With a right to be admitted with counsel to a judicial hearing—open or closed at defendant's whim—where a motion to dismiss can be carried to the United States Supreme Court . . . transcript provided. *California Constitution,* Art. I, sec. 8 and Penal Code sections 58 to 873, 875 to 883 and 995.

If the last two quotations actually constitute the free-wheeling authority of each state, then how in the world can Petitioner then assert to this court that it has the duty to give Petitioner a common law jury . . . a fair trial.

The Assertion is made because on the one hand either [A] the Fourteenth Amendment by itself now demands that Oregon afford a suspected felon the same unanimous jury as is required in forty-eight[12] of the other states[13] and the United States *or* [B] the Fourteenth Amendment incorporates the Sixth Amendment and/or the Fifth.

A. The Fourteenth Amendment Requires a Unanimous Jury.

The Supreme Court has said:

> "It is possible that some of the personal rights safeguarded by the first eight amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process of law."
>
> *Twining v. New Jersey*[14] (1908), 211 U.S. 78 (29 S. Ct. 14)

And years later:

> "* * * The due process provision of the Fourteenth Amendment—just as that in the Fifth—has

---

[12]The other state, Louisiana, requires a unanimous jury of twelve only in capital cases; if punishment *may* be hard labor, a unanimous jury of five is sufficient; if punishment *must* be hard labor, then nine of twelve can reach a verdict. La. Const. Art. VII, sec. 41.

[13]Idaho (const. art. I, sec. 7), Montana (art. 3, sec. 23) and Oklahoma (art. 2, sec. 19) allow less than unanimous for misdemeanors.

[14]Overruled in its holding by *Malloy v. Hogan* (1964), 378 U.S. 1 (84 S. Ct. 1489), but not the quoted prognostication.

led few to doubt that it was intended to guarantee procedural standards, adquate and appropriate, then and thereafter, to protect, at all times, people charged or suspected of crime by those holding positions of power and authority. *Chambers v. Florida* (1940), 309 U.S. 227 (60 S. Ct. 472).

"* * * 'the trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law and if it has so great an advantage over others in regulating civil property, how much must that advantage be heightened when it is applied to criminal cases! * * *

[It] is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals.'"

3 Blackstone's Commentaries 397 cited in *Griffin v. Illinois* (1956), 351 U.S. 12 (76 S. Ct. 585) and *Reid v. Covert* (1957), 354 U.S. 1 (77 S. Ct. 1222).

"There is no right more sacred to our institutions of government than the right to a public trial by a fair and impartial jury; no wrong more grevious than its denial, and no greater duty is enjoined upon the courts than to preserve that right untarnished and undefiled. The denial of a fair and impartial trial, as guaranteed by the 6th Amendment to the Constitution, is also a denial of due process, demanded by the 5th and 14th Amendments, and the failure to strictly observe these constitutional safeguards renders a trial and conviction or a criminal offense illegal and void and redress therefor is within the ambit of habeas

corpus. Ex parte Hans Nielsen, Petitioner, 131 U.S. 176, 9 S.Ct. 672, 33 L.Ed. 118; In re Bonner, Petitioner, 151 U.S. 242, 259, 14 S.Ct. 323, 38 L.Ed. 149; Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1416; Bowen v. Johnston, 306 U.S. 19, 59 S.Ct. 442, 83 L.Ed. 455, and Huntley v. Schilder, 10 Cir., 125 F.2d 250. Cf. Frank v. Mangum, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969; Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791, 98 A.L.R. 406, and Lisenba v. California, 314 U.S. 219, 62 S.Ct. 280, 86 L.Ed.—."

Baker v. Hudspeth (1942), 129 F.2d 779, 781. (At page 782, *Baker* mentions the common law jury.)

The test or the tests under the due process clause itself are roughly contained in some general language: the "* * * state prosecutions must, at the least, comport with the 'fundamental conception' of a fair *trial*" *Estes v. Texas* (1965), 381 U.S. 560 (85 S. Ct. 1628, 1641); the right envoked must be fundamental (*Betts v. Brady* (1942), 316 U.S. 455 [62 S. Ct. 1252]); and in *Spencer v. Texas* (1967), ... U.S. ..... (87 S. Ct. 648); (A) Whether such a procedure undermines "* * * the very integrity of the fact finding process" and (B) involves "* * * a clear danger of convicting the innocent."

Though rough, though general, the application is very fine, even specific. Two recent cases show this: *Sheppard v. Maxwell* (1966), 384 U.S. 338 (86 S. Ct. 1507) and *Pate v. Robinson* (1966), 383 U.S. 377 (86 S. Ct. 836).

Sheppard, denied certiorari in 1956 (352 U.S. 910, [77 S. Ct. 118]), didn't have a "fair trial", because

of circus-type publicity in both pre-trial and trial phases. This violates D.P.[15]

Pate, denied certiorari in 1962 (368 U.S. 995 [82 S. Ct. 618]), didn't have a "fair trial" because his competency to stand trial had not been determined. This volates D.P.[16]

Does it violate D.P. to deny the accused a unanimous verdict? Stated conversely, is the requirement of a unanimous verdict in a criminal case an essential element of due process?

> "* * * the requirement of a unanimous verdict is nowhere defined in the constitution as 'a privilege to be enjoyed.' It is the inescapable element of due process that has come down to us from earliest time."
>
> *Hibdon v. U.S.* (1953), 6th Cir., 204 F. 2d 834, 838 (37 A.L.R. 2d 1130);
>
> cited *31 Am. Jur.,* Jury, sec. 10, p. 17.

Dictum in *Fournier v. Gonzales* (1959), 269 F. 2d 26 is *contra* to *Hibdon,*[17] but the court agreed that the "* * * essence of due process [is] that the guilt of the accused must be established by the government beyond a reasonable doubt."

But that is the very reason *Hibdon* gives for demanding unanimity.

> "The unanimity of a verdict in a criminal case is inextricably interwoven with the required measure

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[15]Due Process.

[16]See also, *Turner v. Louisiana* (1965), 379 U.S. 472 (85 S. Ct. 546) bailiffs were witnesses; and cf. *Parker vs. Gladden* (1966) ..... U.S. ..... (87 S. Ct. 468), 5 L. Week 4097.

[17]Citing *Walker v. Sauvinet* (1875), 92 U.S. 90 (23 L. Ed. 678).

of proof. To sustain the validity of a verdict by less than all of the jurors is to destroy this test of proof for there cannot be a verdict supported by proof beyond a reasonable doubt if one or more jurors remain reasonably in doubt as to guilt. It would be a contradiction in terms. We are of the view that the right to a unanimous verdict cannot under any circumstances be waived, that it is of the very essence of our traditional concept of due process in criminal cases, and that the verdict in this case is a nullity because it is not the unanimous verdict of the jury as to guilt."

"* * * It need hardly be demonstrated that to secure conviction a zealous prosecutor would carry a far lighter burden of persuasion in convicting a majority of the jury than in persuading all of its members; that unjust convictions would be increased rather than reduced, and the traditional measure of proof in criminal cases completely destroyed."

Hibdon v. U.S. (supra).

Again, Mr. Justice Harlan dissenting in *Dow, supra,* says, "It does not meet the case to say that a trial by eight jurors is as much a trial by jury as if there were twelve jurors; for if a citizen charged with crime can be subjected to trial by a less number of jurors than that prescribed by the Constitution, the number may be reduced to three."

In *Trail by Jury,* Moschzisker, 2d Ed. (1930), p. 300, the author suggests that a verdict from less than all, tends to exclude the influence of the more conservative, deliberate and just jurors.

"Guilt must be established beyond a reasonable doubt. All twelve jurors must be convinced beyond that doubt; if only one of them fixedly has a reasonable doubt, a verdict of guilty cannot be returned. These principles are not pious platitudes recited to placate the shades of venerated legal ancients. They are working rules of law binding upon the court."

Belleci v. U.S. (C.A.D.C.), 184 F. 2d 394, 403.

It is reversible error not to instruct a jury upon the requirement of unanimity. *People v. Hicks,* 287 N.Y. 165, 38 N.E. 2d 482 (138 A.L.R. 1222); *People v. Green,* 47 Cal. 2d 209 (302 P. 2d 307); *U.S. v. Puff* (2d Cir.), 211 F. 2d 171; *Andrews v. U.S.,* 333 U.S. 740 (68 S. Ct. 880); *State v. Harris* (1959), 152 A. 2d 106.

Something less was asked of the prosecutor; more and easier convictions ensued after Oregon struck down the unanimous jury. The real proof, the sad proof of this last statement is that when Oregon had capital punishment Oregon asked something more of the prosecutor[18] to obtain a death penalty. So does every state with such punishment.

Yet the distinction—treating one defendant different than another—is untenable, unfair and unconstitutional[19]

Mr. Justice Clark says:

"I must conclude here, as in Kinsella, supra, that the Constitution makes no distinction between capital and noncapital cases. The Fourteenth

[18] *State v. Imish,* 281 P. 2d 973 (..... Ore. .....).

[19] *Griffin v. Illinois* (1956), 351 U.S. 12 (76 S. Ct. 585) (free transcripts) on due process and equal protection.

> Amendment requires due process of law for the deprival of 'liberty' just as for deprival of 'life,' and there cannot constitutionally be a difference in the quality of the process based merely upon a supposed difference in the sanction involved. How can the Fourteenth Amendment tolerate a procedure which it condemns in capital cases on the ground that deprival of liberty may be less onerous than deprival of life—a value judgment not universally accepted—or that only the latter deprival is irrevocable? I can find no acceptable rationalization for such a result, and I therefore concur in the judgment of the Court."
>
> *Gideon v. Wainwright* (1963), 372 U.S. 335 (83 S. Ct. 792, 799).

Gideon, of course, is on the right to counsel; that the distinction can no longer be maintained on a right to a jury trial on capital or non-capital cases, please review *Kinsella v. U.S.* (1960), 361 U.S. 234;[20] *Grisham v. Hagen* (1960), 361 U.S. 278;[21] and *McElroy v. U.S.* (1960), 361 U.S. 281.[22]

The right to a jury today is a *right,* further, it is a fundamental right. *Reid v. Covert* (1957), 354 U.S. 4, (77 S. Ct. 1222, 1226-1227); *U.S. v. Maroney* (1966), 3rd Cir, 355 F.2d 302.

> "The cases show * * * that because the court has come to regard the criminal jury trial as a fundamental constitutional *safeguard,* historical barriers to the use of juries are in jeopardy." (Italics added.)
>
> *32 Univ. of Chicago L.Rev.,* 311, 314.

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[20]Non-capital.
[21]Capital.
[22]*Contra, In re Ross* (1890), 140 U.S. 453.

Mr. Justice Douglas calls the right a "safeguard." He says, "the most significant of these (constitutional guarantees for the accused) is the right to trial by jury, one of the most important safeguards against tyranny which our law has designed." That was in *Lee v. Madigan* (1959), 358 U.S. 228, 234.

* * *

B. The Fourteenth Amendment Incorporates the Sixth Amendment and/or the Fifth Amendment.

Truly, *Osbourne* should fall and take part of Article I, Section 11 with it on the strength of the Fourteenth Amendment alone (*supra* "A").

However, even a stronger argument can be made if the Fourteenth indeed picks up the due process clause (the "substantial right" cases above) of the Fifth Amendment and/or the right to an impartial jury clause of the Sixth Amendment.

Little could be gained by trying to decide in this section of the Points and Authorities whether the cases we mention are part of a federal theory to have the first eight amendments consumed by the Fourteenth or whether a particular case is part of a process of absorption or selective incorporation or whatever, but the fact remains that current history shows that each clause of each of these amendments is succumbing or has succumbed—like the proverbial sitting ducks in the shooting gallery.

Too generous a statement? Probably for two reasons only: First: a case like *Hurtado* (*supra*) where California actually does more than dictated by the Fifth Amendment; and Second: A case that won't come up. An example might be the clause of the Eighth Amend-

ment against excessive fines: The United States District Court generally has a more whopping fine than any state court.

But as to the amendments—the clauses that have been swept up by the Fourteenth:

The following cases show the First Amendment:

Gitlow v. New York, 268 U.S. 652, 666, 45 S. Ct. 625, 629 (speech and press); *Lovell v. City of Griffin,* 303 U.S. 444, 450, 58 S. Ct. 666, 668 (speech and press); *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S. Ct. 710 (speech and press); *Staub v. City of Baxley,* 355 U.S. 313, 321, 78 S. Ct. 277, 281 (speech); *Grosjean v. American Press Co.,* 297 U.S. 233, 244, 56 S. Ct. 444, 446 (press); *Cantwell v. Connecticut,* 310 U.S. 296, 303, 60 S. Ct. 900, 903 (religion); *DeJonge v. Oregon,* 299 U.S. 353, 364, 57 S. Ct. 255, 259 (assembly); *Shelton v. Tucker,* 364 U.S. 479, 486, 81 S. Ct. 247, 251 (association); *Louisiana ex rel. Gremillion v. N.A.A.C.P.,* 366 U.S. 293, 296, 81 S. Ct. 1333, 1335 (association); *N.A.A.C.P., v. Button,* 371 U.S. 41, 83 S. Ct. 328 (association and speech); *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar,* 377 U.S. 1, 84 S. Ct. 1113 (association.)

Griswold v. Connecticut (1965), 381 U.S. 479 (85 S. Ct. 1678) is unique. It indicates that the Fourteenth protects the rights of privacy under the First, the Third, the Fourth, the Fifth and the Ninth Amendments.

Next case: Under the Fourth, *Wolf v. Colorado* (1949), 338 U.S. 25 (69 S. Ct. 1359) is overruled by *Mapp v. Ohio* (1961), 367 U.S. 643 (81 S. Ct. 168)

which remembered, "the great case" of *Boyd v. U.S.* (1886), 116 U.S. 616 (6 S. Ct. 524) because of the concept developed that the Fourth and Fifth were running "almost into each other" (116 U.S. at 630; 6 S. Ct. at 532).

FIFTH AMENDMENT:

(1) *Indictment. Hurtado* (*supra*) as stated twice, is innocuous if the preliminary hearing is afforded;

(2) *Jeopardy. Palko v. Connecticut* (1937), 302 U.S. 319 (58 S. Ct. 149) is Cardosa developing law. The concept of "ordered libery," etc. Justice Black on the dissent in a five-four case, *Bartkus v. Illinois* (1959), 359 U.S. 122 at 151 (79 S. Ct. 676 at 696) was so upset by both of these cases that he acknowledged only that *Palko* had allowed a state to appeal, but left open the question of whether the state could be permitted after a trial free from error to try the accused again. *Bartkus,* which held that an acquittal in the Federal Court was no bar to a state conviction, so upset Governor William G. Stratton that he commuted the defendant's life sentence to time served.[23]

The make-up of the court today would almost assure overruling unfair *Palko* and *Bartkus*. That one court agrees, see the precise holding that double jeopardy can not and will not be tolerated—by the Second Circuit Court in a powerhouse opinion. *United States ex rel. Hetenyi v. Wilkins* (1965), 2d Cir., 348 F.2d 844 (cert. den. 375 U.S. 980, 383 U.S. 913 [84 S. Ct. 495]).

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[23] *One Man's Stand For Freedom,* Black-Dilliard (1963), p. 321.

(3) *Incrimination. Twining v. New Jersey* (1908), 211 U.S. 78 (29 S. Ct. 14), a landmark thirty years before *Palko* was overruled in 1964. The case is *Malloy v. Hogan,* 378 U.S. 1,[24] (84 S. Ct. 1489). *Malloy* didn't overrule *Cohen v. Hurley* (1961), 366 U.S. 117 (83 S. Ct. 954) which excepted lawyers from people with a right not to incriminate themselves, but this year *Spevak v. Klein* (1967), ... U.S. .... (87 S. Ct. 625) reversed, holding that lawyers are "persons" and the self incrimination clause of the Fifth is incorporated by the Fourteenth.

Also by the wayside fell, *Adamson v. California* (1947), 332 U.S. 46 (67 S. Ct. 1672) with the same defense lawyer in each case protesting that the prosecutor should not be able to remark to the jury about the defendants' failure to testify. *Griffin v. California* (1965), 380 U.S. 616 (85 S. Ct. 1229).

(4) *Due Process. Hurtado* (*supra*) for one, has been overruled to the extent it holds fourteenth doesn't pick up the due process clause of the fifth amendment. *Jackson v. Denno* (1964), 378 U.S. 368 (84 S. Ct. 1774) is a fine example of the United States Supreme Court working out procedural due process—fifth, fourteenth. *Jackson* said when a specific federal constitutional right is involved, the Supreme Court will design or impose procedure to protect that right.

(5) *Just Compensation.* See *Chicago B. & Q. R.R. Co. v. City of Chicago* (1897), 166 U.S. 226 (17 S. Ct. 581).

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[24]In Accord, *Miranda v. Arizona* (1966), 384 U.S. 512 (86 S. Ct. 1602).

SIXTH AMENDMENT:

(1) *Speedy and Public Trial,* the "speedy" aspect is in *Klopper v. North Carolina* (1967), ... U.S. ..... (87 S. Ct. 988). The "public" aspect is in *In re Oliver,* 333 U.S. 257 (68 S. Ct. 499). The "trial" aspect was given attention in *Estes (supra)* at page 1641 of 85 S. Ct.

(2) *Impartial Jury. Parker v. Gladden* (1966), ... U.S. .... (87 S. Ct. 468) reads:

> "We believe that the statement of the bailiff to the jurors are controlled by the command of the Sixth Amendment made applicable to the States through the Due Process Clause of the Fourteenth Amendment. It guarantees that 'the accused shall enjoy the right to a . . . trial, by an impartial jury . . . [and] be confronted with the witnesses against. . . .' As we said in *Turner v. Louisiana,* 379 U.S. 466, 472-473 (1965), "the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is free judicial protection of the defendant's right of confrontation, of cross-examination and of counsel." Here there is neither dispute as to what the bailiff, an officer of the State, said nor that when he said it he was not subjected to confrontation, cross-examination or other safeguards guaranteed to the petitioner. Rather, his expressions were 'private talk,' tending to reach the jury by 'outside influence.' *Patterson v. Colorado,* 205 U.S. 454, 462 (1907). We have followed the 'undeviating rule,' *Shepherd v. Maxwell,* 374 U.S. 333, 351 (1966), that the right of confrontation and cross-examination are among the fundamental requirements of a constitutionally

fair trial. *Kirby v. United States,* 174 U.S. 47, 55, 56 (1899); *In re Oliver,* 333 U.S. 257, 273 (1948); *Pointer v. Texas,* 380 U.S. 400 (1965)."

Most surely, the word "jury" is entitled to as much emphasis as the word "impartial".

If that is true then *Parker* controls this petition for habeas, *i.e.* if the fourteenth does in fact focus on the sixth, then we already know the sixth demands a common law jury—Judge—Twelve jurors—impartial—unanimous.[25]

(3) *Arraignment*—Please notice *Cole v. Arkansas,* 333 U.S. 196 (68 S. Ct. 514).

(4) *Confrontation—Stein v. New York,* 346 U.S. 156 (74 S. Ct. 1077) and *West v. Louisiana,* 194 U.S. 258 (24 S. Ct. 650), holding no "pick-up" by the state due process clause, are both overruled by *Pointer v. Texas* (1965), 380 U.S. 400 (85 S. Ct. 1065) and *Douglas v. Alabama* (1955), 380 U.S. 415 (85 S. Ct. 1074).

(5) *Subpoena*[26]

(6) *Right to Counsel—Johnson v. Zerbst* (1938), 304 U.S. 458 on federal right to an attorney: "judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus.

Betts v. Brady, 316 U.S. 455, 62 S. Ct. 1252 said that 14 did not pick up 6 and that a right to counsel

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[25]*Contra.* The casual observation of Mr. Justice Harlan in dissent in *Parker,* 'inconsequential incidents in an otherwise constitutionally flawless proceeding * * *"

[26]No case found to date.

was not a fundamental right so that 5 couldn't be picked up either. Then the famous case of *Gideon v. Wainwright* (1963), 372 U.S. 335 (83 S. Ct. 792),[27] held the opposite.

SEVENTH AMENDMENT:

Walker[28] (*supra*) still seems the law here . . . in civil.

EIGHTH AMENDMENT:

Cruel and Unusual—Robinson v. California (1962), 370 U.S. 660 (82 S. Ct. 1417), has the state bound by the eighth thus overruling *O'Neil v. Vermont*, 144 U.S. 323 (12 S. Ct. 693) and *Louisiana v. Resweber* (1947), 329 U.S. 459 (67 S. Ct. 374).

XI.

Walter L. Kroneberger, Jr., Esq., a member of the California Bar, has agreed with Petitioner to become a member of this bar to argue this matter orally.

WHEREFORE, petitioner prays for his life and respectfully begs this court to review the order refusing the Great Writ to petitioner who was absolutely denied the common law jury promistd to all Americans as a constitutional right.

FRANK ANTHONY CARCERANO

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[27] *Gideon's Trumpet*, Lewis (1964) at p. 173 (Random House) says that twenty-three states urged the overthrow of *Betts*.

[28] *Walker v. Sauvinet* (1875), 92 U.S. 90 (23 L. Ed. 678).

APPENDIX

APPENDIX A.

Seal

F. M. Sercome, Clerk

State of Oregon
SUPREME COURT
Salem 97310
July 25, 1967

Mr. John Patrick Cooney
Attorney at Law
1005 East Main Street
Medford, Oregon 97501

Mr. Walter L. Kroneberger, Jr.
Attorney at Law
1436 Marcelina Avenue
Torrance, California 90503

Re: Carcerano v. Gladden

Gentlemen:

I am directed to inform you that the Court has today denied petitioner's petition for writ of habeas corpus in the above matter.

Very truly yours,
F. M. Sercombe
Clerk

FMS:ek
cc: Mr. David H. Blunt
Assistant Attorney General
Supreme Court Building
Salem, Oregon 97310

APPENDIX B.

Memorandum in Opposition to Petition for Habeas Corpus.

In the Supreme Court of the State of Oregon.

Frank Anthony Carcerano, Petitioner, vs. Clarence T. Gladden, Warden of the Oregon State Penitentiary, or John Doe, Acting Warden, Respondent.

Petitioner has brought a broadside attack upon the provisions of Article I, § 11, Oregon Constitution allowing conviction in circuit court prosecutions by verdict of ten members of the jury, on the basis that a less than unanimous verdict denied him due process of law under the United States Constitution. He asks this Court to reverse its holding in State v. Osburne, 153 or 484, 57 P2d 1083 (1936), relying mostly upon the language of the United States Supreme Court's per curiam opinion in Parker v. Gladden, ... U.S. ....., 17 L Ed2d 420, 87 S Ct 468 (1966) to the effect that a criminal defendant is entitled to be tried by twelve impartial and unprejudiced jurors.

Having been the respondent in the Parker case as well as here, respondent submits that the facts in *Parker* are not controlling herein. The language of the Supreme Court in that case was in response to an argument that based upon the evidence adduced at the post conviction hearing the judge should not have made a finding of fact that petitioner in that case was prejudiced by improper remarks of the trial bailiff because

respondent felt that the record did not show that enough jurors heard the remarks to warrant such a finding. *Parker* neither expressly nor by implication requires a unanimous verdict to validate a conviction, although it does require that none of the jurors be subjected to conduct of an officer of the court that may result in a juror becoming prejudiced against the defendant.

It is well established that convictions based on less than unanimous verdicts do not violate due process of law. Jordan v. Massachusetts, 325 U.S. 167, 32 S Ct 651, 56 L Ed 1038 (1912); Fournier v. Gonzales, 269 F2d 29 (1st CCA 1959) cert den sub nom, Sampredo v. People of Puerto Rico, 359 US 931, 3 L Ed2d 633, 79 S Ct 610.

Respectfully submitted,

Robert Y. Thornton
Attorney General
David H. Blunt
Assistant Attorney General
Attorneys for Respondent

Certified to be a true and correct copy of the original and of the Writs thereof. David H. Blunt, Assistant Attorney General. Of Attorneys for Respondent.

State of Oregon, County of Marion—ss.

I hereby certify that on the 12th day of July, 1967, I served the within MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS upon John Patrick Cooney and Walter L. Kroneberger, Jr., Attorneys for Petitioner, by then depositing in the United States Post Office at Salem, Oregon, a full, true and correct copy thereof, addressed to the said John Patrick Cooney at 1005 E. Main Street, Medford, Oregon 97501; and the said Walter L. Kroneberger, Jr., at 1436 Marcelina Avenue, Torrance, California 90503, and fully prepaying the postage thereon to each said attorney.

David H. Blunt
Assistant Attorney General
Of Attorneys for Respondent

APPENDIX C.

Appendix C is merely composed of nine copies of the printed petition for habeas corpus in the Supreme Court in Oregon.